-467

FILE COPY

FILED

SEP 20 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72- 72-467

AUBREY KAUFMAN,

Petitioner,

against

DIVERSIFIED INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP HANDELMAN
1776 K Street, N.W.
Washington, D. C. 20006

HALPIN, KEOGH & ST. JOHN
630 Fifth Avenue
New York, N. Y. 10017

ROBERT M. TRIEN
WILLIAM J. STUTMAN
360 Lexington Avenue
New York, N. Y. 10017
Counsel for Petitioner

September 19, 1972

INDEX

	PAGE
Opinions below	1
Jurisdiction	1
Question presented	2
Statement of the case	2
Reasons for granting the writ	7
Conclusion	20
Appendix A—Court of Appeals opinion	1a
Appendix B—District Court opinion	15a

Citations

Cases:

Agostino v. State, 255 App. Div. 264, 5 N.Y.S. 2d 732 (1938)	9
Allen v. Fox, 51 N.Y. 562 (1873)	14n
Atkins v. Garrett, 270 F. 939 (5th Cir. 1921)	17
Barber v. Ellingwood, 137 App. Div. 704, 122 N.Y. Supp. 369 (1910)	18
Barnes v. Brown, 130 N.Y. 372, 29 N.E. 760 (1872)	18
Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946)	13
Buyer v. Mercury Tech. Cloth & Felt Corp., 301 N.Y. 74, 92 N.E. 2d 896 (1950)	11

Cases (Continued):

PAGE

Crocker-Wheeler Co. v. Varick Realty Co., 104 App. Div. 568, 88 N.Y. Supp. 412 (Sup. Ct. 1904) 15

Fink v. Bedell, 1 F. 2d 73 (3rd Cir. 1924) 17

Gelb v. Zimet Bros., 34 Misc. 2d 407, 228 N.Y.S. 2d 111 (Sup. Ct. 1962), aff'd. 18 A.D. 2d 987, 237 N.Y.S. 2d 989 (1963) 17

Harris, Upham & Co. v. Bartlett, 435 F. 2d 855 (10th Cir. 1971) 17

Hartford Acc. & Indem. Co. v. Walston & Co., 22 N.Y. 2d 672, 238 N.E. 2d 754, 291 N.Y.S. 2d 366 (1968) 17

Henry v. North American Ry. Const. Co., 158 F. 79 (8th Cir., 1907) 17

Losei Realty Corp. v. City of New York, 254 N.Y. 41, 171 N.E. 899 (1930) 13

Mayer v. Monzo, 221 N.Y. 442, 117 N.E. 948 (1917) 17

McGreevy v. New York Cent. R. Co., 243 App. Div. 264, 277 N.Y.S. 1 (1928) 19

Michalowski v. Ely, 7 N.Y. 2d 71, 163 N.E. 2d 863, 195 N.Y.S. 2d 630 (1959) 19

In re New York, N. H. & H. R. Co., 64 F. Supp. 487 (D.C. Conn. 1945) 11

New York Water Servicing Corp. v. City of New York, 4 A.D. 2d 209, 183 N.Y.S. 2d 538 (1957) .. 8

Pastor v. B. Lindner & Bros., 233 App. Div. 396, 253 N.Y. Supp. 184 (1931) 14

Pennell v. New Jersey Brass Corp., 186 N.Y. Supp. 606 (App. Div. 1921) 14, 15

Richard v. American Union Bank, 253 N.Y. 166, 170 N.E. 532 (1930) 14, 14n

CASES (Continued):

	PAGE
Rosen v. Duggan's Distillers Product Corp., 23 A.D. 2d 635, 256 N.Y.S. 2d 950 (1965)	9
S & L Paving Corp. v. MacMurray Tractor Co., 61 Misc. 2d 90, 304 N.Y.S. 2d 652 (Sup. Ct. 1969)	15
Simon v. Electrospace Corp., 28 N.Y. 2d 136, 269 N.E. 2d 21, 320 N.Y.S. 2d 225 (1971)	10
Slaughter v. Philadelphia National Bank, 290 F. Supp. 234 (E.D. Pa. 1968), rev'd. on other grounds, 417 F. 2d 21 (3rd Cir. 1968)	15
Sloane v. McKane, 131 App. Div. 244, 115 N.Y. Supp. 648 (1909)	9
Southern Materials Co. v. Bryan Rock & Sand Co., 308 F. 2d 414 (4th Cir. 1960)	15
Spitz v. Lesser, 302 N.Y. 490, 99 N.E. 2d 540 (1951)	13
Wildes v. Robinson, 50 App. Div. 192, 63 N.Y. Supp. 811 (1900)	9
Wright v. Bank of the Metropolis, 110 N.Y. 237, 18 N.E. 79 (1888)	17

MISCELLANEOUS:

Annot., 31 A.L.R. 3d 1286 (1970)	17
89 C.J.S. Trover & Conversion, § 121 (1955)	17
New York Civil Practice Law & Rules § 7108(a)	19
V Williston on Contracts § 1138 (rev. ed.)	8
11 Williston on Contracts § 1390 (1968)	6
3 Williston on Sales § 594 (1948 ed.)	16

Supreme Court of the United States

October Term, 1972

No. 72-

AUBREY KAUFMAN,

Petitioner,

against

DIVERSIFIED INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Aubrey Kaufman, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on May 22, 1972.

Opinions Below

The Opinion of the Court of Appeals, not yet reported, is reproduced as Appendix "A" hereto, pp. 1a-14a, *infra.*

The Opinion of the District Court for the Southern District of New York is unreported, and is reproduced as Appendix "B" hereto, pp. 15a-34a, *infra.*

Jurisdiction

The Opinion and Judgment of the Court of Appeals was entered on May 22, 1972. A timely petition for rehearing and *en banc* request was denied on June 22, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether in a breach of contract action to recover damages resulting from the depreciation in value of shares of stock which occurred between the date of promised delivery and the date of actual delivery, the injured party, as a prerequisite to recovery, must prove that he intended to sell the stock prior to such depreciation?

Statement of the Case

Prior to May 9, 1968, the petitioner Aubrey Kaufman ("petitioner" or "Kaufman") was the owner of 17½% of the outstanding stock of Datatron Processing, Inc. ("Datatron"). On that date, he (and the five other shareholders of Datatron) entered into a contract with the respondent Diversified Industries, Inc. ("respondent" or "Diversified"), a public company whose shares were traded on the American Stock Exchange (68-84).* Under the contract, which specified that it was to be "governed, interpreted and construed according to the laws of the State of New York" (83), respondent acquired all of the outstanding shares of Datatron, in exchange for which respondent agreed to deliver two blocks of Diversified stock on two separate occasions. Petitioner received the first block. Respondent's obligation to deliver the second block was contingent on the earnings performance of Datatron for a specified period of time. The parties stipulated below that the performance of Datatron was in fact such

* Numbers in parenthesis refer to pages of the Joint Appendix utilized by both parties in the Court of Appeals. Numbers followed by the letter "a" refer to pages in the Appendix to this Petition.

as to obligate respondent to deliver to petitioner shares of Diversified stock having a "market value" of $486,377.50 (58) and that the number of shares to be delivered was to be determined in accordance with a formula specified in the contract. Under the relevant terms, the delivery to petitioner had to take place within 30 days after respondent's receipt of a certain financial statement, agreed to by Datatron's former shareholders, showing that Datatron's earnings were above a sum fixed by the contract. Respondent admitted below that it received such a statement on May 5, 1969 (58), so that the latest date it was obligated to deliver the stock to petitioner was therefore 30 days later, namely, June 4, 1969 (6a, 29a).

Under the contract, the shares of Diversified stock deliverable to petitioner were deemed to have a then market value per share equal to the average closing price per share on the American Stock Exchange for "the twenty day period next preceding delivery of the shares" (74). Accordingly, respondent was obliged to deliver 14,739 shares to petitioner by June 4 (359).* For reasons not here relevant, respondent failed to deliver any stock to petitioner until August 1, some two months after the date fixed by the contract, by which time the market price per share of Diversified stock on the stock exchange had declined from $33 to $21.63 (344), a drop of approximately one-third. Moreover, respondent delivered only 13,170 shares instead of the 14,739 required by the contract (59). Accordingly, the stock, when actually delivered, had a total value of $284,867.10 (based on stock market quotations), which was $201,510.40 less than the $486,377.50 in total value which petitioner was entitled to receive.

---

* The number of shares was calculated as follows: Respondent had to deliver shares having a total value of $486,377.50. The average price of Diversified (Common) stock for the twenty day period prior to June 4 was $33 per share (344). Dividing the total value by the price per share yields 14,739.

After a jury trial on the issue of estoppel resulted in a verdict favorable to petitioner, the District Court held that respondent was liable for breach of contract because of its failure to deliver the 14,739 shares of stock to petitioner by June 4, 1969 (16a-18a). The Court further held that the date of promised delivery, *i.e.*, June 4, determined the date from which damages were to be measured and reasoned that the amount of petitioner's damages, in order to put him in as good a position as he would have been had respondent performed the contract, was the value of the stock to which he was entitled on June 4, less the value of the stock which he received on August 1 (29a-30a). However, the District Court found that since under the terms of the contract (paragraph 11 [79-82]) the stock to be delivered was not registered under the Securities Act of 1933 and its saleability was restricted by the contract, it had a market value which was 50% of the value of unrestricted stock (18a-19a; 30a). The Court's finding as to the discounted value was based on an evaluation of the expert testimony of witnesses produced by both sides (18a-19a), who testified that there was in fact a market for the unregistered shares which petitioner was to receive, but that the shares had a value of approximately 50% of the market price of registered shares which were traded on the stock exchange. The Court therefore computed petitioner's damages to be $100,750.95 (19a).*

---

* The Court arrived at this figure in the following manner:

"I. Agreement under contract; shares of Diversified to be delivered on June 4, 1969—14,739 shares

Market price per share on June 4, 1969	$ 33.00	
Discount of 50% per share ..	$ 16.50	
14,739 shares x $16.50 equals	$243,193.50	
Loss to plaintiff on June 4, 1969		$243,193.50

On appeal, the Second Circuit agreed with the District Court that respondent had breached its contract with petitioner and that petitioner should have received 14,739 shares on June 4 (5a-8a). However, the Court of Appeals disagreed with the District Court's allegedly "simplistic" computation of damages, finding that "[t]he basic error below was the failure to separate and analyze the two distinct elements of damage; the non-tender of 1,569 shares and the delayed tender of 13,170 shares" (9a). The Circuit Court held that petitioner was damaged solely because of the non-delivery of the 1,569 shares, in the amount of $25,888.50,* but was not damaged by the delayed delivery of the remaining 13,170 shares even though the market value of the stock had declined by one-third between the contract date and the actual delivery date. The Circuit Court thus reduced the damages awarded by the District Court by $74,871.45 (10a-13a), reasoning that "if we assume that [petitioner] would not have sold the shares in the interim [between the contract date of June 4 and the actual delivery date of August 1], then on August 1

II.	Subsequent partial delivery on August 1, 1969—13,170 shares		
	(Loss to plaintiff on June 4, 1969—carried forward)		$243,193.50
	Market price per share on August 1, 1969	$ 21.63	
	Discount of 50% per share	$ 10.815	
	13,170 shares x $10.815 equals	$142,433.55	
	Credit		$142,433.55
	Damages to plaintiff		$100,759.95"

(19a)

* The figure was arrived at by multiplying the 1,569 shares by $33 (the June 4 price), discounted by the 50% figure for restricted stock utilized by the District Court (10a).

he was as in as good a position as he would have been had he received the 13,170 shares on June 4" (10a).

Although the highly speculative question of whether petitioner would have disposed of his stock during this period was never raised in the pleadings, the detailed pretrial order (56-66), or at the trial itself, the Second Circuit went on to hold that petitioner had failed to meet a newly announced burden of proving that he would have sold the stock had he received it on time and before it depreciated in value (11a-12a).*

The Court acknowledged that no such burden is ordinarily imposed where there has been a delay in delivery of property (10a). Indeed, the Court cited the rule as enunciated in 11 Williston, Contracts § 1390 (1968), as follows: "The normal measure of damages . . . is the difference in value of the goods at the date contracted for and their value when delivered." However, the Circuit Court, without citation to any precedent, held that this rule is predicated on an assumption that the property involved would have been immediately resold if it had been delivered on time, and is not applicable where the delayed delivery is of securities, stating (10a-11a): "In dealing with securities . . . particularly those that are restricted, it cannot be assumed that resale would have followed in the normal course of events."

---

* Despite the fact that the parties did not try any issue regarding intent to sell, the Court, in footnote 8 to its opinion (12a-13a), cited testimony from the record below which purportedly "points in the . . . direction" that petitioner did not intend to sell his stock. However, each of the references made by the Court is either unsupported by the record or is in direct conflict with the evidence given at the trial. To take the most important reference, the Court stated that "Kaufman made no attempt to dispose of 8,015 Diversified shares which he already owned". That statement is false, the only testimony being that petitioner sold 2,000 unregistered shares (out of the 8,015) to Diversified on April 29, 1969 (Trial on Damages, p. 27, Ex. G), approximately two months before the promised date of delivery of the shares in suit.

Reasons for Granting the Writ

The Circuit Court has totally misconstrued and misapplied fundamental principles of damages which, prior to the decision below, had been consistently followed by New York courts and by other Circuits. The Court below has imposed an unjust and unconscionable burden on innocent persons injured by the wrongful actions of others. A person seeking just and fair compensation for the wrong done to him must now prove what he would have done in the absence of such wrongdoing. More particularly, the Second Circuit has adopted the novel theory that where it is found that a person has breached a contract by delayinng delivery of stock in a public corporation, which stock demonstrably depreciated in value during the period of the delay, the injured party must prove that he would have sold the stock before it depreciated. It is highly illogical to impose such a burden when the injured party is effectively prevented from being in a position to even seek to make a such re-sale because of the wrongdoer's breach.

If this Court does not review and overturn the Second Circuit's decision, the unprecedented, unsound, and unfair rule will prevent innocent parties from recovering damages to which they are entitled. Thus, the basic reason why certiorari should be granted is to prevent such an ill-advised decision, handed down by a most respected and influential tribunal, from causing a radical departure from principles of damages which have heretofore been universally applied.

The Second Circuit's Decision is in Direct Conflict with Basic Principles of Damages which have been Consistently Applied by New York Courts and the Other Circuit Courts.

By ruling that petitioner had to prove his intent to resell the stock which had not been delivered to him (even though petitioner did not have dominion over the stock), the Second Circuit has thus adopted a position which is diametrically opposed to New York law, and indeed to basic common law principles which have been followed by both Federal and State courts throughout the country. The rule newly announced by the Court departs from the basic principle of indemnity which underlies the law of damages. That principle is enunciated in *New York Water Servicing Corp.* v. *City of New York,* 4 A.D. 2d 209, 163 N.Y.S. 2d 538 (1957):

> "In fixing damages the object generally is to compensate or to indemnify, that is, to put the plaintiff in as good a position as he would have been had the defendant abided by its agreement (Williston on Contracts rev. ed. Vol. V, Sec. 1138) . . . Gains prevented as well as losses sustained are proper elements of damage. There is no rule of thumb to be applied to any given set of facts. We must look to the nature of the contract and the circumstances surrounding its breach."

While the Circuit Court gave lip service to this principle (9a-10a), the new rule which it has engrafted onto the law of damages departs from two universally applied principles which are designed to effectuate the indemnity principle. They are that (1) damages are to be measured as of the date of the breach and (2) any assumption that must be made should be that which is most favorable to the party who has been wronged. The Circuit Court refused to measure damages as of the date of promised delivery (the date of the breach), holding that "*if we*

assume that [plaintiff] would not have sold the shares" (10a) prior to August 4, the date of actual delivery, he was then not damaged in any way. Such an assumption clearly favors the party who has breached the contract.

These two principles from which the Circuit Court has departed have been firmly entrenched in both the statutory and decisional law of New York. In *Agostino* v. *State*, 255 App. Div. 264, 266, 5 N.Y.S. 2d 732 (1938), the Court set forth the first of these principles:

> "It has been stated as a general rule that whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him, and that a just indemnity can never be less than (although it may sometimes be more) than the specified amount of money, or the value of the property or service *at the time it should have been paid or rendered.*" (Emphasis supplied.)

The rule set forth in *Agostino* has been followed in New York cases involving breaches of contracts to deliver stock. See, for example, *Wildes* v. *Robinson*, 50 App. Div. 192, 63 N.Y. Supp. 811 (1900) and *Sloane* v. *McKane*, 131 App. Div. 244, 115 N.Y. Supp. 648 (1909), wherein it was held that damages are to be measured at the time of the breach. While the District Court followed this basic rule in calculating petitioner's damages, the Second Circuit completely ignored it, and its ramifications, in refusing to allow petitioner damages for the late delivery of stock which he had previously paid for. The critical fact which had to be proved in both *Wildes* and *Sloane, supra*, is the market value at the time of breach, not what the party deprived of his stock would have done with it once he obtained it. See also *Rosen* v. *Duggan's Distillers Product Corp.*, 23 A.D. 2d 635, 256 N.Y.S. 2d 950 (1965).

Similarly, the principle requiring the measurement of damages as of the date of the breach has been applied so as

to limit recovery. In *Simon* v. *Electrospace Corp.*, 28 N.Y. 2d 136, 269 N.E. 2d 21, 320 NYS 2d 225 (1971), New York's highest court applied the foregoing measure of damages to a situation where a plaintiff broker had been injured by the defendant company's breach of a contract to deliver stock, the court holding that in computing plaintiff's damages it was erroneous to credit him with the value of a dividend on shares of stock he never owned but would have owned if defendant had performed its contractual obligations and plaintiff had *not* sold his shares. This holding is in direct contrast with the Second Circuit's requirement that as a prerequisite to recovering damages the petitioner had to show that he intended to resell stock which he did not have. Such a practice of measuring a party's damage by highly conjectural conditions subsequent was thus condemned in *Simon*.*

The Second Circuit rule would have the detrimental effect of discouraging persons from accepting late delivery of depreciated property, since by such acceptance they would be penalized by not being able to recover the loss caused by the depreciation. The rule would thus tend to proliferate litigation.**

---

* The Circuit Court did acknowledge and indeed applied the rule requiring the measurement of damages as of the date of the breach, with respect to the 1,569 shares which were never delivered. The court awarded $25,888.50 for failure to deliver those shares, basing the damages on the value of those shares as of June 4, the date of promised delivery. The Court did not require a showing that plaintiff intended to sell those shares before they depreciated in value. Its decision is thus internally inconsistent.

** The Circuit Court, on patently erroneous reasoning, held that petitioner was not being penalized for accepting the late delivery of 13,170 shares, even though by having refused it, "he could have received their dollar value as of June 4, saddling respondent with the market drop" (12a). The court reasoned that with the damages of $217,305 which he would have received had he refused delivery (computed by applying the 50% discount for limited marketability) petitioner could have purchased only 10,047 shares on August 1 (when the price was $21.63 on the Exchange) which was fewer shares than

Petitioner's damages were deemed by the Second Circuit to be highly speculative because of his failure to have met the newly announced burden of showing intent to resell before the market dropped. However, in view of the Circuit Court's express acceptance of the District Court's finding that there was an available market for the shares even though they were not registered (8a, 19a), the damages were not conjectural. Both petitioner (and respondent) introduced proof as to the market value of respondent's stock on both key dates, viz., June 4 (the contract delivery date and the date of the breach) and August 1 (the actual delivery date). Petitioner did not have to show that he actually intended to sell the stock, merely that there was in fact a market for such stock. See *Buyer* v. *Mercury Tech. Cloth & Felt Corp.*, 301 N.Y. 74, 77, 92 N.E. 2d 896 (1950), where the New York State Court of Appeals, with reference to a defendant's breach of a contract to timely deliver goods, held that although the injured party must show the actual availability of a market, "the law does not require that he actually make the purchase." This issue was discussed at length in *In Re New York, N. H. & H. R. Co.*, 64 Supp. 487 (D. C. Conn. 1945). There, various persons holding stock as collateral for payment of notes of a bankrupt railroad were enjoined from selling the stock. The injunction was eventually lifted upon a finding that it was wrongfully obtained but by that time the stock had become worthless. The Court held:

---

the 13,170 he actually accepted. That analysis is clearly illogical since the 10,047 purchased through the Exchange would have been registered and thus not subject to the discount, while the 13,170 he accepted were unregistered. The court thus erroneously concluded that petitioner was better off on August 1, having accepted 13,170 unregistered shares worth $142,433.55 (13,170 x 21.63 x 50%) than he would have been if he had 10,047 registered shares worth $217,305. This obvious error in the court's analysis is at the heart of its decision.

> "(I)t is clear that the injunction was the proximate cause of the loss to the pledgees of their jus disponendi. . . . They are entitled to compensation measured by what they could have realized, *without proof that they would have elected to liquidate if they had been free to do so.* . . . In cases of conversion generally the measure of damage is the value of the property converted; to recover that value *the owner is not required to show what disposition he would have made had the conversion not occurred.* 65 C. J. 131. And if the wrongful detention of a chattel causes the owner to lose a ready market, the damage is recoverable, A. L. I. Restatement, Torts Vol 4, Pg. 674, *without necessity for proof, I think, that the owner would have availed himself of that market but for the wrongful detention which prevented him.* . . . The underlying principle, I apprehend, is founded upon the recognition of the fact that one having unqualified title to property, and indeed one having a qualified title with power of sale, has *unfettered choice as to whether he will hold and enjoy the property or by sale obtain its equivalent in cash. When deprived of that right by a wrongful act, compensation dependent upon a perilous opportunity to show that he would have sold of his own volition is something less than full compensation.* . . . Indeed, often — perhaps generally — the intervention of a wrongful act is not foreseen and the victim has in readiness no conscious policy for his guidance through an unexpected situation. Notwithstanding, *he is entitled to be restored to a position in which his range of elective action is as broad as under his original right.*" (Emphasis added.)

The District Court below, with which the Circuit Court disagreed, adhered to these principles, stating:

> "Defendant's third defense is based on the proposition that any evaluation of the 13,170 shares of stock as of June 4, would be speculative for two reasons: (1) There is no way to accurately fix money damages on that date; (2) the court is making an unwarranted assumption that plaintiff would have sold the stock had he been in possession of it. *First,* this

> court has already ruled, and defendant in his brief against plaintiff's motion to include a remedy for specific performance, concurred, that the money value of the stock is readily ascertainable. *Second*, the theory of damages applied by the court does not assume that the plaintiff would have sold the stock; it merely values the loss caused by the breach by the amount which plaintiff would have received had defendant fully performed. Obviously, the choice of whether plaintiff would have sold or retained the stock would have been solely plaintiff's decision". (31a-32a).

The fact that it cannot be said with absolute certainty that petitioner would have availed himself of the market by selling his shares should not be a bar to recovery. See *Spitz* v. *Lesser*, 302 N.Y. 490, 492, 99 N.E. 2d 540 (1951), wherein the New York Court of Appeals, relying on a decision of this Court, held:

> "Since it is defendant's own wrong which has rendered it impossible for plaintiff to prove his damages with more certainty, he cannot complain of the alleged uncertainty. The reason for this has been well expressed by the Supreme Court of the United States in *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264-265, 66 S.Ct. 574, 580, 90 L. Ed. 652:
>
> > 'Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. * * *
> >
> > 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' "

A case squarely in point, dealing with damage caused by delay in the delivery of a commodity of fluctuating value,

is *Richard* v. *American Union Bank*, 253 N. Y. 166, 174, 170 N. E. 532 (1930). New York's highest court there held:

> "Damages for failure to perform a contract for the delivery of a commodity are measured by the value of performance at the stipulated time. Delayed performance of the contract may be less valuable than the performance as stipulated. Though a buyer of a commodity may accept delivery of the commodity after the stipulated date, he may still retain his right of action for damages caused by delay. Personal Property Law (Consol. Laws, c. 41) § 130. At least where the commodity is purchased for resale and has a fluctuating market value the damages suffered by delayed delivery of the commodity are measured by the difference between the market value at the stipulated time of delivery and the market value at the time of the delayed delivery." *

Further, under New York law it is clear that mere acceptance of delayed delivery does not bar a suit for damages due to delay and that the question of subsequent resale, if applicable at all, relates solely to mitigation of damages, not to whether a party has in fact suffered such damages. See, e.g., *Pastor* v. *B. Lindner & Bros.*, 233 App. Div. 396, 253 N. Y. Supp. 184 (1931). The critical test is whether a party can prove that he has been damaged due to the delay. *Losei Realty Corp.* v. *City of N. Y.*, 254 N. Y. 41, 50, 171 N. E. 899 (1930); *Pennell* v. *New Jersey*

---

* The Second Circuit purported to distinguish *Richard* v. *American Union Bank*, *supra*, by pointing out that the New York Court expressly limited its decision to cases where the commodity "is purchased for resale". The New York Court, however, was not distinguishing between a purchase by an investor and one by a trader, as is suggested by the Second Circuit. Rather the New York Court was distinguishing between purchase for resale and purchase for use, in which latter case, the measure of damages would not be the decline in value but rather the "value of the use". See *Allen* v. *Fox*, 51 N. Y. 562 (1873). An investor as well as a trader "purchases for resale" rather than for use, and the *Richard* case is clearly applicable.

Brass Corp., 186 N. Y. Supp. 606 (App. Div. 1921); *Crocker-Wheeler Co.* v. *Varick Realty Co.*, 104 App. Div. 568, 88 N. Y. S. 412 (1904); *S & L Paving Corp.* v. *MacMurray Tractor Co.*, 61 Misc. 2d 90, 304 N. Y. S. 2d 652 (Sup. Ct. 1969). As the District Court found, because of the substantial drop in the market price between the contract date and the delivery date, the value of the stock delivered to petitioner depreciated by in excess of $100,000. Petitioner has therefore met the only applicable burden.

In an analogous situation involving the exchange of property, the Fourth Circuit, in *Southern Materials Co.* v. *Bryan Rock & Sand Co.*, 308 F. 2d 414 (1960), has taken a position contrary to the Second Circuit's, but in accordance with New York law. In this case the defendant bought land from plaintiff in exchange for gravel. It sought to evade damages for its failure to comply with its contractual obligations on the speculative ground that plaintiff *might* improperly have disposed of the gravel. The Fourth Circuit summarily rejected this contention as to future intent of the plaintiff in language which is highly relevant to the instant petition:

> "Under the settled rule the plaintiff is entitled to the market value of the undelivered material and the defendant is not relieved of the obligation to deliver because of the possibility that the plaintiff might make improvident use of the material rather than sell it at the market price."

A conflict between the Third Circuit and the Second Circuit is reflected in *Slaughter* v. *Philadelphia National Bank*, 290 F. Supp. 234 (E.D. Pa. 1968), *rev'd on other grounds* 417 F. 2d 21 (3rd Cir. 1968). In that case the defendant had possession of stock of a closely held corporation, which had been placed with it as collateral for a loan. The defendant was found to have wrongfully failed to deliver the stock back to plaintiff until a time when the stock had become worthless. The District Court awarded

damages "measured by the depreciation in the fair value of the property wrongfully held . . ." (290 F. Supp. at p. 237). Neither the District Court nor the Third Circuit held that plaintiff must have proven that he intended to sell the stock before it became worthless. Indeed, it was there found that *there was no market* for the stock, since the stock was closely held (the plaintiff being one of six stockholders), it was not listed on any exchange and there had "not been a sale of stock from which a fair market value could be determined" (290 F. Supp. at p. 237). Despite this, the court awarded damages measured by depreciation in value (evidence having been offered of its "intrinsic value") without any evidence that the plaintiff either intended or indeed that he would have been able to sell the stock. In the instant situation, the stock, albeit unregistered, was of a publicly held company whose shares were traded on the American Stock Exchange, and the court found, on ample evidence, that there was an available market for it at a 50% discount from the price of registered shares.

Accordingly, it is clear that the Second Circuit has departed from basic principles of contract law by assuming a fact most favorable to the party who breached the contract. It is patently erroneous to impose upon the innocent party the loss resulting from the decline in the market value of the stock between the promised date and the actual delivery date, based upon speculation as to what he would have done if he had the shares at the promised time. If the issue is to turn upon a point as speculative as that, the person who committed the breach should bear the burden of the speculation.

Moreover, respondent, in effect, had converted petitioner's shares by failing to deliver them when required under the contract. See Williston on Sales (1948 Ed.), Vol. 3, Sec. 594. The same principles referred to hereinabove have been consistently applied in cases involving the

conversion of commodities like stock which by their nature have a fluctuating value. In such instances, the damages awarded by the New York State courts are the market value of the stock on the day of conversion, or the market value within a reasonable time after learning of the conversion, whichever is higher. See *Hartford Acc. & Indem. Co.* v. *Walston & Co.*, 22 N.Y. 2d 672, 238 N.E. 2d 754, 291 NYS 2d 366 (1968); *Mayer* v. *Monzo*, 221 N.Y. 442, 117 N.E. 948 (1917); *Gelb* v. *Zimet Bros.*, 34 Misc. 2d 401, 228 N.Y.S. 2d 111 (Sup. Ct., 1962), *aff'd* 18 A.D. 2d 967, 237 N.Y.S. 2d 989 (1963), and cases cited in *Annot.*, 31 A.L.R. 3d 1286, 1323-1329 (1970). The same rule has been applied by various Circuit courts. See, for example, *Atkins* v. *Garrett*, 270 F. 939 (5th Cir. 1971); *Henry* v. *North American Ry. Const. Co.*, 158 F. 79 (8th Cir. 1907); *Fink* v. *Bedell*, 1 F. 2d 73 (3rd Cir. 1924); *Harris, Upham & Co.* v. *Bartlett*, 435 F. 2d 855 (10th Cir. 1971. In none of these cases was plaintiff held to have the burden of proving that he *would* have sold his stock on the applicable date used for measuring his damages. As the Court noted in *Wright* v. *Bank of the Metropolis*, 110 N.Y. 237, 248-49, 18 N.E. 79 (188), the New York rule pertaining to the measure of damages in conversion cases obviates the need for making unnecessary assumptions based on the injured party's supposed intent.

In direct conflict with the view enunciated by the Second Circuit, 89 C.J.S. Trover and Conversion, § 121 (1955) categorically states the rule as follows:

> "In order to recover the value of the property converted the owner is *not* required to show what disposition he would have made had the conversion not occurred; and if the wrongful detention of property causes the owner to lose a ready market, the damage is recoverable, *without* necessity for proof that the owner would have availed himself of that market but for the wrongful detention." (Emphasis added)

Finally, the New York courts have explicitly stated that the foregoing principles are equally applicable to cases involving conversion or cases involving breaches of contracts to deliver stock, where, as here, the injured party has already paid the consideration specified in the contract. See, for example, *Barnes* v. *Brown*, 130 N.Y. 372, 29 N.E. 760 (1872); *Barber* v. *Ellingwood*, 137 App. Div. 704, 122 N.Y.S. 369 (1910).*

Underlying the principles enunciated by the foregoing cases is the policy consideration that because of the inherently unstable nature of the commodities market it would be imposing a harsh burden on stockholders wrongfully deprived of their dominion over their shares to have to prove what they would have done with such shares at any given moment had they received them. Even if the petitioner were an investor (as distinguished from a trader), his decision to hold, like that of any stockholder, would not be irrevocable but rather was subject to constant re-evaluation in light of market conditions. The petitioner was here deprived of the opportunity to sell during a period when there was a dramatic drop in the stock, going from $33 a share to $21.50 a share, a drop of

---

* The Second Circuit found the stock conversion cases to be inapplicable on the purported ground that contrary to the instant case, they involved situations where "the complaining party had unfettered control of stock, but his *jus disponendi* was destroyed by the wrongful act of another." See footnote 8, p. 13a, *infra*. If the Court meant that petitioner did not have "unfettered control" of his stock because it was unregistered, it has previously been pointed out that both parties presented proof, accepted by the District Court in a finding expressly approved by the Circuit Court, that an available market for such stock did in fact exist. The restrictions on saleability, caused by the stock's not having been registered, is reflected in the 50% discount. Petitioner's "*jus disponendi*" was destroyed by the wrongdoing of respondent as effectively as in the cited stock conversion cases. It is therefore patent that the principles enunciated in those cases are clearly applicable hereto.

more than one-third in the value of petitioner's 13,170 shares. Certainly this is compensable damage. The cases cited herein so hold.

Finally, the situation at bar is tantamount to a suit for damages for wrongful detention of property. Under Article 7 of the New York Civil Practice Law and Rules, where a suit is brought for the recovery of personal property which has been wrongfully detained (formerly known as a replevin action), it is specifically provided that damages may be awarded for "depreciation of a chattel" CPLR 7108(a). Indeed, as was held by the New York Court of Appeals in *Michalowski* v. *Ely*, 7 N.Y. 2d 71, 163 N.E. 2d 863, 195 N.Y.S. 2d 633, 635-36 (1959):

> "If the property depreciated in value . . . the plaintiff is entitled not only to such depreciation, but to the 'interest on the [property's] value, taken as it was before the depreciation' as well."

There is no requirement imposed in such cases or in the statute that plaintiff sustain a burden of proving that he had intended to sell the property before it depreciated. See also *McGreevy* v. *New York Cent. R. Co.*, 243 A.D. 264, 277 N.Y.S. 1 (1928).

It is thus apparent that the Second Circuit has refused to follow the long line of State and Federal precedents which specifically deal with damages arising from the wrongful failure to deliver property belonging to another, whether such conduct be labeled breach of contract, conversion, or wrongful detention. Instead, the Court, without reference to any precedential authority, has announced a new rule which imposes upon an innocent party the burden of proving what he would have done if he had not been denied his property, a burden which unwisely and unjustly incorporates a highly speculative, subjective and elusive standard into the law of damages. Indeed, such a rule has

been expressly rejected by every other court which has been confronted by the issue. Its application in this case has resulted in the denial of just compensation and will have an enormous impact on the law of damages.

CONCLUSION

For these various reasons, this Court should grant certiorari and review the judgment and opinion of the Second Circuit.

Respectfully submitted,

PHILIP HANDELMAN
1776 K Street, N.W.
Washington, D. C. 20006

HALPIN, KEOGH & ST. JOHN
630 Fifth Avenue
New York, N. Y. 10017

ROBERT M. TRIEN
WILLIAM J. STUTMAN
360 Lexington Avenue
New York, N. Y. 10017

Counsel for Petitioner

Appendix A

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 669—September Term, 1971.

(Argued May 3, 1972 Decided May 22, 1972.)

Docket No. 71-1859

AUBREY KAUFMAN,

Plaintiff-Appellee,

v.

DIVERSIFIED INDUSTRIES, INC.

Defendant-Appellant.

Before:

KAUFMAN, ANDERSON and MANSFIELD,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard H. Levet, *Judge*, awarding Kaufman $152,885.40 as damages for Diversified's breach of contract.

Affirmed in part, reversed in part and remanded.

Appendix A

ROBERT M. TRIEN, New York, N.Y. (Philip Handelman, New York, N.Y. and Halpin, Keogh & St. John, New York, N.Y., of counsel), *for Plaintiff- Appellee.*

LAWRENCE M. POWERS, New York, N.Y. (Steven E. Gross, New York, N.Y. and Powers & Gross, New York, N.Y., of counsel), *for Defendant-Appellant.*

KAUFMAN, *Circuit Judge:*

In the main, this appeal presents a narrow and highly technical question of contract damages. The law of damages, however, does not lend itself to easy application or simplistic formulations, as our discussion will reveal, and an exposition of the complexities in this difficult case does not make for light reading.

In May 1968, Aubrey Kaufman and the five other shareholders of Datatron Processing, Inc ("Datatron") sold their Datatron shares to Diversified Industries, Inc.[1] ("Diversified") in exchange for Diversified shares, some to be delivered immediately, some contingent on Datatron's future performance. Kaufman commenced this action in the Supreme Court, New York County (subsequently removed by Diversified to the District Court for the Southern District of New York because of diversity of citizenship), alleging that Diversified had breached its agreement to deliver conditional shares. Judge Levet determined as a matter of law that Diversified had breached the contract, and after the jury ruled in favor of Kaufman on Diversi-

---

[1] Diversified Industries, Inc. was formerly (and at the time of the agreement here in question) known as Diversified Metals Corporation.

fied's estoppel defense,[2] the parties stipulated to try the damage issue before the court. The total damages calculated by Judge Levet were $152,885.40—$100,759.95 for the breach itself, $34,438.65 for reasonable costs of the litigation reimbursable under an indemnity provision of the contract and the remainder for prejudgment interest. Diversified contends on appeal that the court erred in directing a verdict on liability and, in any event, erred in computing damages. We affirm the directed verdict on liability, but reverse and remand on the issue of damages.

A statement of the facts leading to the breach will aid in clarifying our resolution of the issues. Kaufman owned 17½% of the shares of Datatron when, on May 9, 1968, he and the five other Datatron shareholders contracted to sell all of the stock in Datatron to Diversified solely in exchange for Diversified shares. Pursuant to the contract of sale, Diversified initially delivered 45,800 Diversified shares to the six Datatron stockholders, of which Kaufman received 8,015. The agreement also provided that the selling shareholders would receive an additional sum of Diversified shares contingent on and varying with the performance of Datatron for the year ending December 31, 1968. The crucial provisions, which determined at what date and in what manner the number of shares due as additional compensation were to be computed, are subdivisions ii and iii of section 3(c) which follow:

> (ii) If for the calendar year ended December 31, 1968, the business of the Company and its subsidiaries has Net Income After Taxes as set forth in

[2] Diversified does not here challenge the jury's adverse conclusion on its estoppel claim which was based on Kaufman's alleged acquiescence in the May 5 leter purporting to fix the number of shares due under the contract. The jury was justified in finding no detrimental reliance by Diversified, even if Kaufman's actions did amount to acquiescence. Diversified discusses the estoppel defense on appeal only in an attempt to substantiate its contention that the trial court took inconsistent positions at the trials on liability and damage.

section 3(b)(i) which is in excess of $125,000, the Stockholders shall be entitled to receive shares of Diversified Stock having a then market value equal to four times the amount of the Net Income After Taxes in excess of $125,000. For example, if Net Income After Taxes for the year ended December 31, 1968 is $200,000, the Stockholders shall receive four times $75,000, i.e. $300,000 in value of Diversified shares.

(iii) Diversified shall deliver additional shares payable hereunder within 30 days after receipt of the financial statement, together with written approval by Stockholders, from which it appears that the earnings of the Company and its subsidiaries were such as to require a payment of additional shares hereunder. The shares of Diversified Stock deliverable shall be deemed to have a then market value per share equal to the average closing price per share of Diversified Common Stock, on the Stock Exchange where it is traded, for the twenty day period next preceding delivery of the shares. The market value in shares payable shall be divided by the then market value per share of Diversified Stock for determining the number of shares deliverable to the Stockholders.

An independent accountant, Lybrand, Ross Bros. & Montgomery, made the initial determination of the net income attributable to Datatron, which was subsequently approved by the former Datatron shareholders on April 29, 1969. It was stipulated in a Pre-Trial Order that the former shareholders, pursuant to section 3(c)(ii), were "entitled to receive shares of Diversified stock having a market value of $2,779,300, plaintiff's pro-rata share thereof being the amount of $486,37.50."

In its May 5 letter (signed by George Moll, President), acknowledging receipt of the approved income statement, Diversified calculated the number of shares due the former Datatron shareholders purportedly under section 3(c)(iii),

by using the average market price per share for the twenty business days preceding May 5 ($36.93). The letter stated that "[i]nstructions will be entered to issue certificates in the following names and amounts: . . . Aubrey Kaufman—13,170."

The price of Diversified shares began dropping in May 1969. On June 4, thirty days after acknowledgment of the approved financial statement, the closing price as well as the twenty-day average price of Diversified was $33. As yet, no shares had been delivered to Kaufman. It was not until August 1, 1969, that Kaufman received 13,170 shares of Diversified stock, the amount determined in the May 5 letter. The twenty-day average price as of August 1 was $23.24, and the August 1 closing price was $21.63.

Kaufman signed a receipt for the 13,170 shares on August 1 and forwarded a registered letter to Moll, which read in full:

> I hereby acknowledge receipt of 13,170 shares of Diversified Metals Corporation Stock. However, it is my understanding that the per share value was to be computed on an average price per share twenty days preceding issuance of the shares.
>
> Please examine your records as I believe Diversified Metals Corporation is in error.

This lawsuit followed.[3]

I. Breach

The threshold question is whether, as a matter of law, Diversified breached its contractual obligations. There is no dispute that physical delivery of shares did not occur until August 1. Diversified contends that the May 5 letter

[3] Other grounds for recovery pleaded by Kaufman, including a prayer for rescission, were disposed of by the trial court. No appeal has been taken from these actions.

and other actions it took in preparation for physical delivery constituted "delivery" of shares for purposes of the agreement. Judge Levet, however, excluded evidence that Diversified took immediate steps to perform including evidence that it notified the New York Stock Exchange (with whom a listing was pending) that additional shares had been reserved for issuance to the former Datatron shareholders.

None of the excluded evidence, however, would have turned the issue of delivery into a jury question. Section 1-201 of the Uniform Commercial Code (McKinney 1964)[4], the general definitional section, defines delivery with respect to securities as "voluntary transfer of possession." More specifically, §8-313 (1)(a) provides that delivery occurs when a person acquires possession of a security. Although §8-313(1)(d), relied upon by Diversified, broadens delivery to include possession by a third person for the account of another, that is obviously not the case here. It was conceded that on May 5 there were insufficient authorized shares to pay Kaufman and the other Datatron sellers. It would be straining the meaning of "possession" to hold that possession passed where the shares allegedly possessed are not even in existence.

II. Damages

A. *Date for Valuation of Shares*

In directing a verdict on the issue of breach, Judge Levet found that the delivery of shares did not take place within thirty days of receipt of the approved financial statement. All now agree that delivery should have occurred on or before June 4, 1969.

---

[4] Section 21 of the agreement stipulated that New York law is to govern.

Appendix A

Once the parties stipulated that the court could fix damages, the court's initial task was to fix the date to be used in valuing the shares. The number of shares to be delivered to Kaufman to fulfill the contractual requirement that their market value total $486,377.50 then could be calculated. The date opted for by Kaufman was August 1. A literal and superficial reading of the contract lends some support to this contention, since August 1 was the date of delivery. Under this theory, because the twenty-day average price as of August 1 was $23.24, Kaufman should have received 20,931 shares—7,761 more than he actually received. His damages would be the August 1 value of these shares. This interpretation, seemingly correct at first blush, cannot withstand scrutiny. If the price of Diversified shares had been rising, Diversified could have delayed delivery indefinitely, and, with each price increase, it would in theory owe Kaufman fewer shares.[5] The obvious expectation of the parties was that the price of Diversified shares would continue to increase, since the market price had risen so remarkably from the date the Diversified stock was issued to the public in 1966 until the May 9, 1968, contract date. The purpose of requiring delivery within thirty days of receipt of the approved financial statement was to prevent Diversified from benefiting by extended delay in performance. To give any meaning to the thirty-day limit the contract must be interpreted so that it specifies not only the date for latest

[5] Because share price was to be computed by using a twenty-day average price, such delay would be completed risk-free. If the market price were much higher on the twentieth day than on the first, Diversified could safely delay delivery. Even if the price dropped on the twenty-first day, the twenty-day average would rise because the lower first day price would be eliminated in making the computation. Thus by employing this method, Diversified would owe fewer shares, and could keep delaying and profiting until the market price fell to its first day level.

delivery within its terms, but also the date for computing the number of shares payable. Thus, whether or not any shares were actually delivered on June 4, the contract fixed the number of shares due Kaufman on that date. This is what Judge Levet concluded, and the parties have not disputed this finding on appeal. As the twenty-day average price on June 4 was $33, Kaufman should have received 14,739 shares.

B. *Calculation of Damages*

To calculate the monetary damages attributable to the breach, the court below first discounted the value of the Diversified shares because the shares contracted for were so-called "letter" stock. Such stock cannot be sold freely to the public and thus has limited marketability. In brief, although the shares to be delivered were to have a value of $486,377.50 as defined in the contract, the market value of the shares would actually be significantly less than the defined value. Thus, damages for total breach would be less than $486,377.50. *See* 25 C.J.S. "Damages" § 79(f): "Where . . . the contract is to pay specific property, the measure of damages is the value of the property at the time of the breach, and this is true although the parties to the contract for the purpose of determining the quantity to be delivered have placed a price on it." Judge Levet decided upon a discount of 50%.[6]

---

[6] At a supplemental hearing, both parties presented expert testimony to guide the court in choosing the proper figure at which to discount the value of the unregistered shares. Kaufman's three witnesses stated that a proper discount would be 20 to 33⅓% of the American Stock Exchange price. Diversified's witnesses testified the discount should be 40-60%. The court's choice of a 50% figure is thus supported by evidence and is not clearly erroneous. Indeed, Kaufman, who would benefit from use of a smaller figure, does not contest that 50% figure.

The court then calculated damages merely by subtracting the value received, $142,433.55 (13,170 shares at the August 1 market price of $21.63 discounted by 50%), from the value of promised performance, $243,193.50 (14,739 shares at the June 4 market price of $33 discounted by 50%), and arrived at a figure of $100,759.95. This simplistic computation obscured the nature of damages suffered for it confused the number of shares due with the value of those shares. Using the trial court's analysis, we question what the damages would have been if the price of Diversified shares fortuitously had risen to $40 by August 1. The court's figure for the value of the promised performance—$243,193.50—would remain unchanged. The value of the consummated performance, i.e., the value of the shares received on August 1, however, would be 13,170 times $40 discounted by 50%, or $263,400. Under these circumstances, the court would have been compelled to conclude that Kaufman in fact benefited from the breach, a startling result indeed when we already have determined that Kaufman should have acquired 14,739 shares but only received 13,170. Certainly these missing shares must have had some value, and Kaufman should recover their value whether the price of the shares has increased or decreased. Otherwise, the computation of damages would undercut our conclusion that Diversified should not be allowed to benefit from indefinite delay.

The basic error below was the failure to separate and analyze the two distinct elements of damage: the non-tender of 1,569 shares and the delayed tender of 13,170 shares.

There can be no doubt that damage resulted from the non-tender of sufficient shares. Here we recognize the general principle of contract law that "[i]n determining the amount . . . of 'damages' to be awarded, the aim in view

is to put the injured party in as good a position as he would have had if performance had been rendered as promised." *Corbin, Contracts* § 992 (1964). Damages are thus the value of 1,569 shares on the date of breach, *i.e.*, 1,569 at $33 per share on June 4, discounted by 50%, or a total of $25,888.50.

Whether Kaufman suffered compensable damages as a result of the delayed tender is more problematical. Because he eventually received and accepted 13,170 shares on August 1, it is difficult to discern how the delay caused any damage, unless he would have sold the shares between June 4 and August 1. If we assume that he would not have sold the shares in the interim, then on August 1 he was in as good a position as he would have been if he had received the 13,170 shares on June 4. Reverting to Professor Corbin's formulation of the pertinent law of damages for breach of contract, we are of the view that no damages should have been awarded for delayed tender.

Kaufman, however, urges us to adopt a different rule in the case of a delayed performance. As stated by Williston:

> The normal measure of damages . . . is the difference in value of the goods at the date contracted for and their value when delivered.

11 *Williston, Contracts* §1390 (1968). We note first that Williston specifically qualifies his formulation by stating that only consequential and foreseeable damages can be recovered. *Id.* Damages caused by a decrease in price may well be foreseeable, but are not always the consequence of delayed performance unless it can be assumed the shares would have been sold. Furthermore, Williston explicitly refers to breaches by "sellers" and implicitly to sales of goods, with citations exclusively to article 2 of the Uniform Commercial Code which excludes securities from its

reach. This is crucial because merchants and traders, in the normal course of business, sell or otherwise dispose of commodities. The rule affording them recovery for the drop in price is merely a shortcut for applying the traditional rule of damages as stated by Corbin. In dealing with securities, however, particularly those that are restricted, it cannot be assumed that resale would have followed in the normal course of events.

Kaufman relies heavily on *Richard* v. *American Union Bank*, 253 N.Y. 166 (1930), but we do not find it to be helpful to his position. The facts in *Richard* disclose that he paid $72,500 to the defendant Bank in exchange for future delivery of two million Rumanian lei (the currency of that country). The Bank did not deliver the foreign currency until well after the stipulated date, by which time the two million lei had dropped substantially in value measured by American dollars. The New York Court of Appeals, affirming an order striking affirmative defenses of defendant, held that Richard could recover damages for the delay. The opinion, however, makes clear that the crucial factor in its holding was the indication in the pleadings that Richard intended to resell the lei:

> Delayed performance of the contract may be less valuable than the performance as stipulated. Though a buyer of a commodity may accept delivery of the commodity after the stipulated date, he may still retain his right of action for damages caused by delay. . . . *At least where the commodity is purchased for resale* and has a fluctuating market value the damages suffered by delayed delivery of the commodity are measured by the difference between the market value at the stipulated time of delivery and the market value at the time of the delayed delivery. (Emphasis added.)

Id. at 174.[7] The record in this case does not permit an inference that Kaufman would have sold the 13,170 shares had he received them on June 4. In fact, although Kaufman had the burden of proof on this issue, all the evidence points in the other direction.[8]

---

[7] Moreover, the pleadings in *Richard* indicated that the Bank knew the price of lei was falling and deliberately delayed performance so that it could buy lei at the market after the price dropped, and then perform its contract with Richard with the depreciated currency. Here, of course, Diversified in no way profited from the delay. Its own stock—the "currency" envisioned in the contract—was no less costly to Diversified merely because its market value has dropped.

[8] For example, Kaufman made no attempt to dispose of 8,015 Diversified shares which he already owned. Nor did he sell the 13,170 shares when he received them, although the price continued to drop.

It might appear that we are penalizing Kaufman for having accepted the 13,170 shares, for it would seem that if he had refused them on August 1, he could have received their dollar value as of June 4, saddling Diversified with the market drop. Closer analysis, however, indicates this is not so. A court awarding damages would have valued the shares after a suitable discount for their limited marketability, just as Judge Levet did. Assuming Kaufman expected the company to continue performing well, he was in a better position with the 13,170 unregistered shares in his possession than with damages in lieu thereof. His damages on June 4 with respect to the shares would have been 13,170 times $33 discounted by 50%, or $217,305. Even at the August 1 price of $21.63, Kaufman could have purchased only 10,047 Diversified shares for $217,305—considerably fewer than were delivered by Diversified. Moreover, the value of unregistered shares would soon approach the open market price because the May 9, 1968 agreement provided that Diversified would use its best efforts to register all unsold shares of the former Datatron owners within three years. The undisputed evidence indicates Kaufman was desirous of maintaining a position in Diversified stock. This was particularly true on August 1, since

Appendix A

In light of our discussion, we conclude that Kaufman's damages should have been limited to $25,888.50 for the non-delivery of 1,569 shares.

III. Other Recovery

In addition to the damages occasioned by non-delivery, Kaufman is entitled under section 6 of the agreement to indemnification for "reasonable costs, legal and other expenses" incurred as a result of Diversified's breach. Since we have reduced the damage award significantly and legal fees depended on a contingent fee agreement which Judge Levet considered in making his award, it follows that

---

August 12 had been set for a spin-off distribution of Datatron stock to shareholders of record of Diversified. Thus an award of damages for late delivery would simply present Kaufman with a windfall.

This is in sharp contrast to the cases Kaufman cites in which market drops were laid at the defendant's door even without demonstration that the plaintiff would have sold his shares in the interim. In *In re New York, N.H. & H.R. Co.*, 64 F. Supp. 487 (D. Conn. 1945), those holding stock as collateral were wrongfully enjoined from selling the shares. By the time the injunction was lifted, the stock had become worthless. The noteholders then sought treatment as secured creditors to the extent of the value of shares when the injunction was ordered. The court properly rejected the argument that the noteholders must show they would have sold the shares but for the injunction. After all, the wrongful act obtaining the injunction—precluded the noteholders from taking the very steps defendants insisted they must prove. Crucial to the recovery in *New York, N.H. & H.R. Co.*, then, was that the complaining party had unfettered control of stock, but his *jus disponendi* was destroyed by the wrongful act of another. This is also true of the stock conversion cases cited by Kaufman. *See e.g., Gelb* v. *Zimet*, 228 N.Y.S. 2d 111 (N.Y. Sup. Ct. 1962); *German* v. *Snedeker*, 257 App. Div. 596, *rearg. denied* 258 App. Div. 708, affd. 281 N.Y. 832 (1939); cases cited in 31 A.L.R. 3d 1923-29 (1970).

Judge Levet should reconsider damages under the indemnification clause.[9]

Finally, we agree that Kaufman is entitled to interest on the damage award pursuant to New York C.P.L.R. §5001, which upon remand will be adjusted in light of the reduced recovery.

We have examined the other arguments of the parties, but find them to be without merit.

Affirmed in part, reversed in part and remanded for further proceedings in accordance with this opinion.

---

[9] The district judge should be mindful that allowable costs have increased because of this appeal and the further proceedings that will be required. Since costs on appeal would be recoverable under the indemnity clause of the contract, it would be a waste of time to take the circuitous route of awarding costs on appeal against Kaufman only to permit him to be indemnified for these costs by Diversified. Accordingly, we direct that the costs on appeal be taxed against Diversified.

Appendix B

(Opinion of the District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civil 4594

AUBREY KAUFMAN,

Plaintiff,

against

DIVERSIFIED INDUSTRIES, INC.,

Defendant.

Appearances:

HALPIN, KEOGH & ST. JOHN
Attorney for Plaintiff
630 Fifth Avenue
New York, N. Y.
Philip Handelman,
Robert Trien,
360 Lexington Avenue
New York, N. Y.
Of Counsel.

POWERS AND GROSS
Attorneys for Defendant
110 East 59 Street
New York, N.Y.
Lawrence M. Powers,
Of Counsel.

LEVET, *D. J.*

This is an action brought by plaintiff Aubrey Kaufman against Diversified Industries, Inc. ("Diversified") for

damages resulting from a breach of contract to deliver stock.

A jury trial on the issue of liability commenced on April 26, 1971. The court ruled that the only defense available to the defendant was the defense of estoppel. The jury returned a verdict for plaintiff as to this issue, thus finding defendant liable for breach of contract.

Upon suggestion of the court and by agreement of counsel on May 3, 1971, the damage portion of the trial was conducted before the court. The trial was held on May 6 and 13, 1971 and a supplemental hearing was conducted on June 28, 1971. After the trial, plaintiff submitted a motion to amend the complaint to provide for damages by specific performance. This motion was denied on June 7, 1971.

Thus the issues remaining to be determined by this court are as follows: (1) the amount of damages; (2) the amount of prejudgment interest; (3) the amount of indemnity.

After hearing the testimony of the parties, examining the exhibits, the pleadings and the Proposed Findings of Fact and Conclusions of Law submitted by counsel, this court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff at the commencement of this action was, and presently is, a resident of the State of New York. Defendant at the commencement of this action was, and presently is, a resident of the State of Delaware. The amount in controversy exceeds $10,000, exclusive of interests and costs. 28 USC § 1332(a)(c).

2. Defendant Diversified entered into a contract dated May 9, 1968 (Pl. Ex. 1) with plaintiff, Aubrey Kaufman, and five other stockholders of Datatron Processing Inc. ("Datatron"), a New York corporation, which contract

provided for the exchange of all the issued and outstanding capital stock of Datatron solely for shares of common stock of defendant Diversified (Pl. Ex. 1, p. 1, "Plan of Reorganization"). Plaintiff owned 17½% of the outstanding stock of Datatron (35 shares) prior to the agreement (Pl. Ex. 1, p. 1, ¶ 1(a)(3)).

3. Under the terms of paragraphs 3(c)(ii) and (iii) of the contract of May 9, 1968, plaintiff and other former stockholders of Datatron were entitled to receive shares of Diversified stock equal to four times the 1968 net income of Datatron (after taxes) in excess of $125,000 (Pl. Ex. 1, p. 7, ¶ 3(c)(ii)). In accordance with that agreement and the 1968 net income statement of Datatron, plaintiff and other former stockholders of Datatron were entitled to receive shares of Diversified having a market value of $2,779,300; plaintiff's pro-rata share thereof being $486,377.50 (Pretrial Order ¶ 6).

4. Under the terms of the contract of May 9, 1968 (Pl. Ex. 1, ¶ 3(c)(iii)), plaintiff was entitled to delivery of 14,739 shares of Diversified common stock on June 4, 1969. This number of shares is computed, pursuant to the contract, by dividing the amount owed to plaintiff ($486,377.50) by the average price of Diversified stock 20 days prior to June 4, 1969 ($33 per share).

5. The term "average closing price * * * for the twenty day period next preceding delivery" (Pl. Ex. 1, ¶ 3(c)(iii)) means the average of the closing prices of Diversified common stock on the American Stock Exchange for the twenty trading days prior to June 4, 1969, beginning May 6, 1969 and ending June 3, 1969 (Supplemental Hearing, Tr. 5, 6, 8, 9). The word "delivery" in the above-quoted phrase is interpreted to mean the day of promised delivery (i.e., June 4, 1969).

Appendix B

6. The defendant did not deliver any shares of Diversified common stock to plaintiff on June 4, 1969, and thus clearly breached the contract of May 9, 1968.

7. On August 1, 1969, defendant delivered to plaintiff 13,170 shares of restricted Diversified common stock (PTO, ¶ 7).

8. On August 1, 1969, plaintiff wrote to defendant informing it that it had not delivered the required number of shares pursuant to the contract (Pl. Ex. 7).

9. The closing price of Diversified common stock traded on the American Stock Exchange for the dates indicated below are as follows:

June 4, 1969 .....$33.00 per share
August 1, 1969 .....$21.63 per share

The average price of Diversified common stock for the 20 days prior to June 4, 1969 was $33 per share (Supplemental hearing, Tr. 5, 6).

10. The contract provided that the consideration to plaintiff was the delivery of shares of Diversified common stock (Pl. Ex. 1, pp. 1, 7, ¶ 3(c)). However, the shares were not to be registered under the Securities Act of 1933 and were subject to other restrictions as more particularly provided in the contract, i.e., "letter stock" (Pl. Ex. 1, ¶ 11).

11. The court finds that on June 4, 1969 and on August 1, 1969 the value of the shares of Diversified common stock which were restricted by paragraph 11 of the contract of May 9, 1968 (Pl. Ex. 1) was 50% of the price of Diversified shares listed on the American Stock Exchange on those dates.*

---

* Plaintiff's experts testified that the discount for the stock would be 20 to 33⅓% of the price on the American Stock Exchange (Supplemental Hearing, Tr. 66-67). Defendant's three experts testified that the proper discount was 40 to 60% of the market price (Supplemental Hearing, Tr. 12-13, 49-50).

> court has already ruled, and defendant in his brief against plaintiff's motion to include a remedy for specific performance, concurred, that the money value of the stock is readily ascertainable. *Second*, the theory of damages applied by the court does not assume that the plaintiff would have sold the stock; it merely values the loss caused by the breach by the amount which plaintiff would have received had defendant fully performed. Obviously, the choice of whether plaintiff would have sold or retained the stock would have been solely plaintiff's decision". (31a-32a).

The fact that it cannot be said with absolute certainty that petitioner would have availed himself of the market by selling his shares should not be a bar to recovery. See *Spitz* v. *Lesser*, 302 N.Y. 490, 492, 99 N.E. 2d 540 (1951), wherein the New York Court of Appeals, relying on a decision of this Court, held:

> "Since it is defendant's own wrong which has rendered it impossible for plaintiff to prove his damages with more certainty, he cannot complain of the alleged uncertainty. The reason for this has been well expressed by the Supreme Court of the United States in *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264-265, 66 S.Ct. 574, 580, 90 L. Ed. 652:
>
> > 'Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. * * *
> >
> > 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' "

A case squarely in point, dealing with damage caused by delay in the delivery of a commodity of fluctuating value,

is *Richard* v. *American Union Bank*, 253 N. Y. 166, 174, 170 N. E. 532 (1930). New York's highest court there held:

> "Damages for failure to perform a contract for the delivery of a commodity are measured by the value of performance at the stipulated time. Delayed performance of the contract may be less valuable than the performance as stipulated. Though a buyer of a commodity may accept delivery of the commodity after the stipulated date, he may still retain his right of action for damages caused by delay. Personal Property Law (Consol. Laws, c. 41) § 130. At least where the commodity is purchased for resale and has a fluctuating market value the damages suffered by delayed delivery of the commodity are measured by the difference between the market value at the stipulated time of delivery and the market value at the time of the delayed delivery." *

Further, under New York law it is clear that mere acceptance of delayed delivery does not bar a suit for damages due to delay and that the question of subsequent resale, if applicable at all, relates solely to mitigation of damages, not to whether a party has in fact suffered such damages. See, e.g., *Pastor* v. *B. Lindner & Bros.*, 233 App. Div. 396, 253 N. Y. Supp. 184 (1931). The critical test is whether a party can prove that he has been damaged due to the delay. *Losei Realty Corp.* v. *City of N. Y.*, 254 N. Y. 41, 50, 171 N. E. 899 (1930); *Pennell* v. *New Jersey*

---

* The Second Circuit purported to distinguish *Richard* v. *American Union Bank*, *supra*, by pointing out that the New York Court expressly limited its decision to cases where the commodity "is purchased for resale". The New York Court, however, was not distinguishing between a purchase by an investor and one by a trader, as is suggested by the Second Circuit. Rather the New York Court was distinguishing between purchase for resale and purchase for use, in which latter case, the measure of damages would not be the decline in value but rather the "value of the use". See *Allen* v. *Fox*, 51 N. Y. 562 (1873). An investor as well as a trader "purchases for resale" rather than for use, and the *Richard* case is clearly applicable.

Appendix B

12. Shareholders of Diversified common stock were entitled to one share of Datatron for each share of Diversified that they held on or prior to June 26, 1969 (PTO, ¶ (a)(9)). The market price of Diversified registered common stock on June 4, 1969 included the value of this spinoff (Supplemental Hearing, Tr. 51-52). Therefore, this court finds that plaintiff is not entitled to any additional compensation due to the Datatron spinoff.

13. Plaintiff is entitled to $100,759.95 plus interest and costs for defendant's breach of contract, computed as follows:

I. Agreement under contract; shares of Diversified to be delivered on June 4, 1969—14,739 shares

Market price per share on June 4, 1969	$ 33.00
Discount of 50% per share	$ 16.50
14,739 shares x $16.50 equals	$243,193.50
Loss to plaintiff on June 4, 1969	$243,193.50

II. Subsequent partial delivery on August 1, 1969—13,170 shares

(Loss to plaintiff on June 4, 1969—carried forward		$243,193.50
Market price per share on August 1, 1969	$ 21.63	
Discount of 50% per share	$ 10.815	
13,170 shares x $10.815 equals	$142,433.55	
Credit		$142,433.55
Damages to plaintiff		$100,759.95

Appendix B

INDEMNITY CLAIMS

14. Paragraph 6 of the contract between plantiff and defendant, dated May 9, 1968 (Ex. 1), is as follows:

> "6. INDEMNITY BY DIVERSIFIED. Diversified hereby agrees to indemnify and hold each of the Stockholders harmless for a period of 36 months from the Closing Date against and in respect of any and all losses, claims, liabilities, damages or deficiencies resulting from any misrepresentation, breach of warranty or other breach hereof or failure of compliance by Diversified under this Agreement or in any document furnished to the Stockholders hereunder, and any and all reasonable costs, legal or other expenses incident to the foregoing.
>
> "If any loss or other basis for indemnification by Diversified to the Stockholders hereunder shall result in any tax saving or other monetary benefit to the Stockholders, the amounts recoverable by the Stockholders hereunder shall be adjusted downward to reflect such benefit."

1. CLAIMS FOR ATTORNEYS' FEES AND EXPENSES

15. On or about September 9, 1969, plaintiff, Aubrey Kaufman, retained Halpin, Keogh & St. John, Esqs., attorneys, of New York City, to represent his claims against Diversified (which claims were the subject matter of this action) (Ex. 20). At that time Kaufman paid a retaining fee of $10,000 to said attorneys (Ex. 21) and in addition agreed to pay one-third of any sum or property received and also any necessary disbursements (Ex. 20).

16. Philip Handelman received a Bachelor's Degree at New York University, graduated from Harvard Law School in 1932, was admitted to the New York Bar in 1934,

Appendix B

12. Shareholders of Diversified common stock were entitled to one share of Datatron for each share of Diversified that they held on or prior to June 26, 1969 (PTO, ¶ (a)(9)). The market price of Diversified registered common stock on June 4, 1969 included the value of this spinoff (Supplemental Hearing, Tr. 51-52). Therefore, this court finds that plaintiff is not entitled to any additional compensation due to the Datatron spinoff.

13. Plaintiff is entitled to $100,759.95 plus interest and costs for defendant's breach of contract, computed as follows:

I. Agreement under contract; shares of Diversified to be delivered on June 4, 1969—14,739 shares

Market price per share on June 4, 1969	$ 33.00
Discount of 50% per share	$ 16.50
14,739 shares x $16.50 equals	$243,193.50
Loss to plaintiff on June 4, 1969	$243,193.50

II. Subsequent partial delivery on August 1, 1969—13,170 shares

(Loss to plaintiff on June 4, 1969—carried forward		$243,193.50
Market price per share on August 1, 1969	$ 21.63	
Discount of 50% per share	$ 10.815	
13,170 shares x $10.815 equals	$142,433.55	
Credit		$142,433.55
Damages to plaintiff		$100,759.95

Appendix B

INDEMNITY CLAIMS

14. Paragraph 6 of the contract between plantiff and defendant, dated May 9, 1968 (Ex. 1), is as follows:

> "6. INDEMNITY BY DIVERSIFIED. Diversified hereby agrees to indemnify and hold each of the Stockholders harmless for a period of 36 months from the Closing Date against and in respect of any and all losses, claims, liabilities, damages or deficiencies resulting from any misrepresentation, breach of warranty or other breach hereof or failure of compliance by Diversified under this Agreement or in any document furnished to the Stockholders hereunder, and any and all reasonable costs, legal or other expenses incident to the foregoing.
>
> "If any loss or other basis for indemnification by Diversified to the Stockholders hereunder shall result in any tax saving or other monetary benefit to the Stockholders, the amounts recoverable by the Stockholders hereunder shall be adjusted downward to reflect such benefit."

1. CLAIMS FOR ATTORNEYS' FEES AND EXPENSES

15. On or about September 9, 1969, plaintiff, Aubrey Kaufman, retained Halpin, Keogh & St. John, Esqs., attorneys, of New York City, to represent his claims against Diversified (which claims were the subject matter of this action) (Ex. 20). At that time Kaufman paid a retaining fee of $10,000 to said attorneys (Ex. 21) and in addition agreed to pay one-third of any sum or property received and also any necessary disbursements (Ex. 20).

16. Philip Handelman received a Bachelor's Degree at New York University, graduated from Harvard Law School in 1932, was admitted to the New York Bar in 1934,

became a member of the Bar of the District of Columbia, practiced extensively, specializing in litigation, is a member of the Bar of this Court and of various Bar Associations. He has also handled cases involving S.E.C. and allied matters (Tr. 288, 289). Robert M. Trien, who was associated with Mr. Handelman in this case, graduated from law school about 1960 (Tr. 307) and is paid a salary (Tr. 310).

17. During preparation for trial the attorneys for Kaufman conducted the depositions of the following persons:

Name	*Date*	*Pages*	*Hours*
Irwin Ross	January 15, 1970	155	4 hours 30 minutes
Irwin Ross	January 16, 1970	43	1 hour 20 minutes
Irwin Ross	April 14, 1970	144	4 hours 30 minutes
Irwin Ross	June 4, 1970	89	3 hours 30 minutes
James F. Cear	Aug. 6, 1970	66	2 hours 20 minutes

Attorneys for plaintiff also attended and represented Kaufman at a deposition of said plaintiff conducted by defense counsel, as follows:

Date	*Pages*	*Hours*
November 20, 1969....	103	3 hours
December 3, 1969....	197	4 hours 50 minutes

On November 20, 1969, Handelman, Trien and Kelly appeared; on December 3, 1969, Handelman and Trien. At times, Mr. Handelman conducted the examination; at other times, Daniel W. Kelly or Eugene J. Keogh; Robert M. Trien, an associate, was present at all times.

The total time expended in taking depositions was approximately 24 hours.

Appendix B

18. I find that plaintiff's counsel, Philip Handelman and Robert M. Trien, attended at trial and hearings after trial as follows:

April 26, 1971—Jury impanelled and trial begun—6 hours

April 27, 1971—Trial before jury continued—6 hours

April 28, 1971—Trial before jury continued—5 hours

April 29, 1971—Trial before jury continued and concluded; motions heard—3 hours

April 30, 1971—Summations delivered—4 hours

May 3, 1971—Jury charged on liability and defense of estoppel; verdict for plaintiff—6 hours

The parties stipulated that the court determine damages and amount of indemnity and the trial proceeded before the court after discharge of the jury.

May 6, 1971—Trial before court; adjourned to May 13—5 hours

May 13, 1971—Non-jury trial continued and concluded—4 hours

June 15, 1971—Conference with counsel re damages —1 hour

June 28, 1971—Further hearing for additional testimony of expert witnesses—3 hours

The total time at trial was approximately 43 hours.

I have no means of estimating other time spent by plaintiff's attorneys on this matter since the attorneys kept no time records and submitted no evidence of time expended.

Appendix B

19. Upon examination of the clerk's file [1] in this case I find that plaintiff's attorneys performed the following services:

A. Before Trial

Prepared the summons and complaint;

Received and examined defendant's answer and counterclaim;

Prepared reply to counterclaims contained in answer of defendant;

Prepared motion papers to compel one Irwin Ross, an officer of defendant, to appear for completion of his deposition, to produce certain documents, and for other relief (Ex. 26);

Prepared motion papers to compel defendant to permit inspection and copying of certain documents;

Prepared plaintiff's requests to charge; prepared plaintiff's supplemental requests to charge; examined defendant's requests to charge;

Prepared plaintiff's pretrial memorandum;

Prepared plaintiff's trial memorandum;

Prepared plaintiff's supplemental trial memorandum;

Prepared pretrial order.

B. After Trial

Prepared plaintiff's proposed findings of fact and conclusions of law;

---

[1] The parties stipulated that the papers in the civil file would be deemed in evidence as to claims of plaintiff for attorney's fees (Tr. 283).

Appendix B

Prepared memorandum of law in support of proposed findings of fact and conclusions of law;

Received and examined defendant's proposed findings of fact and conclusions of law;

Prepared post-trial supplemental memorandum;

Prepared plaintiff's supplemental memorandum of law on damages;

Prepared supplemental brief respecting indemnity;

Received and examined the following memoranda of defendant:

Pretrial memorandium;

Trial memorandum;

Brief on the issue of damages;

Supplemental memorandum of law #2;

Supplemental memorandium of law #3;

Brief on damage formulation of defendant.

20. The basic amount plaintiff will be entitled to as a result of the outcome of this action is $100,759.95 exclusive of interest, costs and indemnity.

21. The testimony as to the value of the legal services was as follows:

Estimate of Handelman (Tr. 306)	$100,000
Opinion of Kleinman (Tr. 327)	70,000 to 80,000

It is clear that neither estimate is appropriate in a matter which proved to involve $100,759.95 (Finding of Fact 20).

Appendix B

Handelman's estimate of $200 per hour or $1,000 per day in court for his own time and $150 per hour for his associate Trien's time is excessive and is not supported by factual testimony or proof of any kind other than Handelman's own "ipse dixit." I find that for an attorney of Mr. Handelman's standing $100 is fair and reasonable and that for Mr. Trien an appropriate amount is no more than $50 per hour. See Oscar Gruss & Sons v. Lumbermen's Mutual Casualty Company, 65 Civil 33, opinion dated November 21, 1968, page 12 (S.D.N.Y.), aff'd 422 F. 2d 1278 (2nd Cir. 1970).

22. Computed on the above hourly basis (Finding of Fact 21), the amount for the depositions which would be allowable are basically as follows:

Handelman	—24 hours at $100	$ 2,400
Trien	—24 hours at $50	$ 1,200

And for trial:

Handelman	—43 hours at $100	$ 4,300
Trien	—43 hours at $50	$ 2,150

Total on hourly basis of $100/$50 on depositions and trial $10,050

The above computation for trial and depositions is merely a partial guide to the total amount to which plaintiff should be awarded as indemnity for attorneys' services.

23. In addition to the time spent at depositions in court, plaintiff is entitled to a fair and reasonable allowance for the time and services and result accomplished by the services performed in the office. No indication of time spent on these services is indicated by the file record (see Finding of Fact 19). Hence, I am unable to make any determination

as to the fair and reasonable fee based solely upon a time computation. Very little time was expended in attempted proof of the value of attorneys' services. Plaintiff's attorneys will have one task yet to complete, i.e., settlement and entry of judgment with taxation of costs. Upon the record submitted, I find that the fair and reasonable amount for all services of the attorneys for which defendant is liable is the sum of $33,585.

EXPENSES OF PLAINTIFF'S ATTORNEYS

24. Plaintiff has submitted a sketchy claim for disbursements of the attorneys in connection with the prosecution of this case. It is unsupported by details, bills of itemization. Counsel apparently relies solely upon the testimony of Philip Handelman, Esq. As recapitulated in a brief of plaintiff entitled, "Supplemental Brief Respecting Indemnity • • •," these were as follows:

"(a) Cost of airline transportation between New York and Florida, plaintiff having resided in Florida during the bulk of the year for health reasons (SM 10)	$1,314.00
Taxi fares to and from the airport (SM 16)	50.00
"(b) Disbursements incurred by counsel in prosecution of the claim, as follows:	
Transcripts of depositions and trial (SM 295)	1,049.20
Additional transcript re damages (389 pages)	622.40
Photostats, telephone and process service (SM 298)	198.66
Additional photostats (SM 297) ($14.99, $26.75)	41.56

Appendix B

Toll calls (SM 297)	$ 19.01
Messenger service to defendant's attorney's office (SM 299)	3.65
Additional photostats (SM 299)	99.90

"(c) Professional witnesses:

Professor Seymour Kleinman (SM 301)	1,500.00
Mr. Joseph A. Walker (SM 301)	500.00"

The following of the above claims are disallowed:

Transportation to Florida	$1,314.00
Taxi fares to and from the airport	50.00

These two items related to the personal affairs of plaintiff. They have nothing to do with the prosecution of the cause of action, which was started by plaintiff in a State Court in New York and removed to the Southern District of New York. His choice of residing in Florida was his own, for which defendant should not be compelled to pay.

The following items are also disallowed because they are taxable in connection with the costs in the judgment to be entered herein:

Transcripts of depositions and trial ...	$1,049.20
Additional transcript re damages	622.40
Transcript of hearing of June 28	116.80
Process service, as part of the item of $198.66	

All of the said items may be taxed as above stated, provided appropriate proof is submitted to the clerk.

Toll calls are disallowed	$ 19.01

No details of these calls were submitted. Telephone calls as a part of the item of $198.66 are also disallowed. Calls to plaintiff in Florida are not chargeable. The item for

photostats, to wit, $41.56, $99.00 and part of the item of $198.66 are disallowed. No proof whatsoever of what papers were copied was submitted, no bills were submitted. It may be that upon satisfactory proof the cost of certain photostats may be taxed in the judgment.

Hence, the only miscellaneous disbursement left is messenger service, $3.65, which is allowed.

2. Expert Witnesses

25. Seymour Kleinman, an attorney, a member of the faculty of Columba Law School and Rutgers University Law School, testified for plaintiff as to (1) the value of certain Lettered Stock of defendant involved in this action, and as to (2) the value of the services of plaintiff's attorneys as a part of the indemnity expenses claimed by plaintiff against defendant (see Tr. 199-215, 311-360).

Joseph A. Walker, registered representative employed by Hardy & Company, investment broker, testified for plaintiff on the value of the stock concerned in this action.

Plaintiff seeks to be reimbursed as part of the indemnity claimed against defendant, the sum of $1,500 for expenses of Kleinman's testimony and $500 for the expense of Walker's testimony.

I find that plaintiff's claim for Kleinman's services is excessive and should be reduced to $600 and that the claim for Walker's services is also excessive and should be reduced to $250.

Hence, I find that plaintiff is entitled by way of indemnity to recover the following sums:

Messenger service	$ 3.65
Kleinman witness charges	600.00
Walker witness charges	250.00
Attorneys' fee	33,585.00
Total Indemnity	$34,438.65

Appendix B

Discussion

I. Damages for Breach of Contract

Plaintiff and defendant entered into a contract for the purpose of defendant's acquisition of plaintiff's (and five other stockholders') shares of Datatron, a New York corporation. Plaintiff was to be compensated as follows: (1) By transfer of a fixed amount of shares of defendant Diversified's common stock; (2) By transfer of a number of additional shares based upon the profit that Datatron netted for 1968.

The trial on defendant's liability and the court's rulings in connection therewith have already established that the contract was breached on June 4, 1969. Defendant agrees and, indeed, has urged that date as controlling (see "Defendant's Brief on the Issues of Damages," p. 1).

The formula for determining the number of additional shares which plaintiff was entitled to is contained in paragraph 3(c) of the contract; it required the defendant to deliver the additional shares within thirty days of receipt of a financial statement evidencing Datatron's net profit for 1968. The same paragraph requires the number of such shares to be calculated by dividing the total amount owned to plaintiff (defined by paragraph 3(c)(ii) and stipulated by the parties to be $486,337.50) by the average price of Diversified common stock for the twenty day period prior to delivery. The term "delivery" is hereby interpreted to mean the promised day of delivery (June 4, 1969).

Defendant received plaintiff's financial statement on May 5, 1969. The contract required delivery within thirty days, i.e. June 4, 1969. The average market price of Diversified common stock on the American Stock Exchange for the twenty day period prior to June 4, 1969 was $33 per share. Dividing the total amount owned to plaintiff ($486,377.50) by that average price, the number of shares which defendant owned to plaintiff on June 4, 1969 was 14,739. Actually, no stock was delivered on said date.

Appendix B

Plaintiff bargained for payment in the form of stock, not cash. Under the terms of the contract (paragraph 11) the stock to be delivered was restricted. The basic rule of contract damages is to put the plaintiff in as good a position as he would have been had the contract been fulfilled. This means that the damages are measured by the value of the performance required under the contract. The expert witnesses have established, and this court has found (Finding of Fact No. 12) that the value of the restricted ("letter") stock was only 50% of the market value of unrestricted common stock. Therefore, under the contract, all damages that plaintiff is entitled to receive as a result of the breach are measured by the discounted value of the restricted stock.

The date of promised delivery (June 4, 1969) determines the date from which damages are measured. Wildes v. Robinson, 50 App. Div. 192 (1900); Sloan v. McKane, 131 App. Div. 244 (1909). Therefore, the amount of plaintiff's damage is the value of the stock to which he was entitled on June 5, 1969 less the value of the stock which he received on August 1, 1969.

The market price of a share of Diversified common stock on the American Stock Exchange on June 4, 1969 was $33. This market price must be discounted by 50% in computing the value of the restricted stock. The number of shares to be delivered on June 4, 1969 (i.e., 14,739) at the discounted value of the stock on that day ($16.50) is $243,193.50. The number of shares delivered on August 1, 1969 (13,170) at the discounted value of the stock on that date ($10.81) is $142,433.55. Crediting defendant with the sum of $142,433.55, plaintiff's damage is $100,759.95.

Defendant has interposed certain allegedly partial and complete defenses to plaintiff's recovery.

The first claim is that plaintiff held equitable ownership of the 13,170 shares from the time that defendant notified plaintiff of its intention to deliver the shares (May 5, 1968) (Pl. Ex. 5). Thus, defendant contends with respect to these

shares that it fully performed its obligation on time. Notwithstanding the cases cited by defendant, which are distinguishable on the facts, Section 8-309 of the Uniform Commercial Code ("UCC") requires *actual* delivery of stock before title can pass. Therefore, plaintiff did not have ownership of the 13,170 shares until August 1, 1969. Nor can defendant take refuge in the fact that plaintiff assigned 5% of his interest in the undelivered shares prior to August 1, 1969, for this transfer was an assignment of a future right.

Defendant's second claim is that plaintiff was obligated, pursuant to UCC 2-607(3)(a) to notify defendant of its breach on June 4, 1969 and that his failure bars recovery. Section 2-607, however, is manifestly inapplicable since it requires a buyer (plaintiff) to notify a seller (defendant) of a breach after the buyer has *accepted delivery* of goods. Here, there was no stock delivered on the due date. Therefore, plaintiff was not obligated to notify defendant on June 4, 1969. On August 1, 1969, plaintiff accepted as partial performance, 13,170 shares but on the same day he notified defendant that its performance was insufficient (Pl. Ex. 7).

Defendant's third defense is based on the proposition that any evaluation of the 13,170 shares of stock as of June 4 would be speculative for two reasons: (1) There is no way to accurately fix money damages on that date; (2) The court is making an unwarranted assumption that plaintiff would have sold the stock had he been in possession of it. *First*, this court has already ruled, and defendant in his brief against plaintiff's motion to include a remedy for specific performance, concurred, that the money value of the stock is readily ascertainable. *Second*, the theory of damages applied by the court does not assume that the plaintiff would have sold the stock; it merely values the loss caused by the breach by the amount which

plaintiff would have received had defendant fully performed. Obviously, the choice of whether plaintiff would have sold or retained the stock would have been solely plaintiff's decision.

Defendant's final claim is that plaintiff was under an obligation to "mitigate" his damages by "going into" the market and purchasing Diversified common stock. While it is true that at one time a common law duty required an aggrieved buyer to purchase goods in lieu of undelivered goods, Parsons v. Sutton, 66 N.Y. 92 (1876), there is no longer such an obligation. UCC 2-712 provides that "covering" for undelivered goods is an optional remedy available to the buyer; "Failure of the buyer to effect cover within this section does not bar him from any other remedy." N.Y. Uniform Commercial Code, 2-712(3) (McKinney 1964). Therefore, at no time was plaintiff under any obligation to purchase additional shares of stock.

II. Plaintiff's Claim for Additional Compensation Re Datatron Spinoff

Plaintiff contends that he is entitled to additional recovery because defendant's breach precluded him from participation in the Datatron spinoff (Finding of Fact 12). Plaintiff is incorrect. As stated previously, the basis for the measurement of plaintiff's damages is the date when performance was required, June 4, 1969. The expert witnesses testified (Supplemental Hearing, Tr. 51-52) and the court has found (Finding of Fact 12) that the market price of Diversified on June 4, 1969 included and reflected the value of the Datatron spinoff. No separate recovery, then, is warranted.

III. Plaintiff's Claim for Interest on the Damages

Plaintiff asserts that he is entitled to interest for the breach of contract under Section 5001, New York Civil Practice Law & Rules. This court is in agreement with that

claim. Section 5001(a) states that interest on a sum awarded for breach of contract shall be awarded. Section 5001(b) states that the interest shall be computed from the date the cause of action existed. The cases which defendant cites in support of his position deal with situations in which the damages were not reasonably calculable. The ruling of this court has been and is that damages are reasonably calculable. Interest from June 4, 1969 to August 1, 1969 on $243,193.50 and interest on $100,759.95 from August 1, 1969 to the date of judgment is appropriate.

IV. INDEMNITY

As already specified (see Finding of Fact 21), only "reasonable costs, legal and other expenses" are reimburseable under the indemnity provision (Ex. 1, ¶ 8).

The fact that Kaufman, plaintiff herein, has entered into a retainer agreement to pay counsel fees, as above set forth, does not obligate defendant to pay plaintiff the same amount. Plaintiff is entitled only to a reasonable amount for such fees and this is a factual question, here for the court to determine.

As Surrogate Delehanty wrote in Matter of Campbell, 176 Misc. 543, 545 (Sur. Ct., N.Y. Co. 1941):

> "****The indemnitee may recognize and place a value upon his damage by way of his counsel fees thereby binding himself to his counsel but in that event he can secure reimbursement only to a reasonable amount—itself a question of fact to be tried when the indemnitor properly raises that question if asked to make good on his promise. (Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 218; White v. Maryland Casualty Co., 139 App. Div. 179, 185).****"

See also Houston and Texas Railway Co. v. Henry Oram, 49 Tex. 341, 346-347 (Sup. Ct. of Texas, 1878).

Appendix B

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action and over the parties (28 USC § 1332(a)) and the law of New York governs the substantive rights of the parties to this dispute.

2. Defendant, Diversified, has breached the contract of May 9, 1968 (Ex. 1) by failing to deliver 14,739 shares of Diversified common stock on June 4, 1969.

3. Plaintiff's damages for the breach of the contract, as heretofore explained, is $100,759.95 plus interest and costs.

4. Plaintiff did not breach any obligation to "mitigate" his damages.

5. Plaintiff is entitled to interest as follows:

(a) From June 4, 1969 to August 1, 1969, interest on $243,193.50; and

(b) From August 1, 1969 to the date of judgment, interest on $100,759.95.

6. Plaintiff is entitled by way of indemnity to recover $34,438.65.

7. Plaintiff is entitled to judgment against defendant in the total sum of $135,198.60 plus interest as aforesaid and costs.

8. Defendant's counterclaims for monetary and injunctive relief regarding an alleged defamation of its business by plaintiff are hereby dismissed.

Settle judgment on notice pursuant hereto promptly.

Dated: New York, N.Y.
July 7, 1971.

RICHARD W. LEVET
United States District Judge

Order Denying Petition For Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1859

AUBREY KAUFMAN,

Plaintiff-Appellee,

against

DIVERSIFIED INDUSTRIES, INC.,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellee.

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

Dated: June 22, 1972

/s/
.....
IRVING R. KAUFMAN

/s/
.....
ROBERT P. ANDERSON

/s/
.....
WALTER R. MANSFIELD

Order Denying Petition For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1859

AUBREY KAUFMAN,

Plaintiff-Appellee,

against

DIVERSIFIED INDUSTRIES, INC.,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

HENRY J. FRIENDLY, *Chief Judge*

June 22, 1972